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In the Supreme Court of the United States

OCTOBER TERM, 1974

BERT A. DAVID, *Commander, Fort Dix Military Reservation,*
JAMES R. SCHLESINGER, *Secretary of Defense,*
PETITIONERS

v.

BENJAMIN SPOCK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and regulations involved	2
Statement	6
Reasons for granting the writ	11
Conclusion	23
Appendix A	1a
Appendix B	9a
Appendix C	33a
Appendix D	34a
Appendix E	36a
Appendix F	39a
Appendix G	44a
Appendix H	47a
Appendix I	56a

CITATIONS

Cases:

Adderley v. *Florida*, 385 U.S. 39	15, 19
Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308	17
Bridges v. *Davis*, 443 F. 2d 970, certiorari denied, 405 U.S. 919	15
Burnett v. *Tolson*, 474 F. 2d 877	17
Burns v. *Wilson*, 346 U.S. 137	13

Cases—Continued

	Page
Butler v. *United States*, 365 F. Supp. 1035	18
Cafeteria & Restaurant Workers Union v. *McElroy*, 367 U.S. 886	12, 14, 21, 22
CCCO-Western Region v. *Fellows*, 359 F. Supp. 644	17
Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548	14
Cox v. *Louisiana*, 379 U.S. 536	15
Flower v. *United States*, 407 U.S. 197	15, 16, 17, 21
Holdridge v. *United States*, 282 F. 2d 302	14, 22
Jenness v. *Forbes*, 351 F. Supp. 88	18
Lehman v. *City of Shaker Heights*, No. 73-328, decided June 25, 1974	14, 18, 19
Lloyd Corp. v. *Tanner*, 407 U.S. 551	17
Orloff v. *Willoughby*, 345 U.S. 83	13
Packer Corp. v. *Utah*, 285 U.S. 105	18
Parker v. *Levy*, No. 73-206, decided June 19, 1974	12, 13, 18, 19, 21
Pell v. *Procunier*, No. 73-918, decided June 24, 1974	21
Poulos v. *New Hampshire*, 345 U.S. 395	21
Public Utilities Commission v. *Pollak*, 343 U.S. 451	18
Saxbe v. *Washington Post*, No. 73-1265, decided June 24, 1974	21
Toth v. *Quarles*, 350 U.S. 11	13
United States v. *Jelinski*, 411 F. 2d 476, certiorari denied, 396 U.S. 943	14-15, 22
United States v. *Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338	13

Cases—Continued

	Page
Weissman v. *United States*, 387 F. 2d 271	14, 22

Constitution, statutes and regulations:

United States Constitution:	
First Amendment	9, 13, 18, 19, 21, 22
Fifth Amendment	9
18 U.S.C. 1382	2-3, 8, 15
28 U.S.C. 1331	12
28 U.S.C. 1331(a)	11
Army Regulations:	
No. 210-10	20
No. 210-10, ¶ 5-5	3-4, 12, 19-20
No. 600-20, ¶ 5-29	10
Fort Dix Regulations:	
No. 210-26	9
No. 210-26, ¶ 2(a)	4
No. 210-27	5, 9
No. 210-27, ¶ 3	5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commanding General of Fort Dix and James R. Schlesinger, the Secretary of Defense, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The initial opinion of the district court (App. A, *infra*, pp. 1a-8a) is reported at 349 F. Supp. 179. The initial opinion of the court of appeals (App. B, *infra*, pp. 9a-32a) is reported at 469 F. 2d 1047. The district court's final opinion (App. F, *infra*, pp. 39a-

43a) is unreported. The final opinion of the court of appeals (App. H, *infra*, pp. 47a-55a) is reported at 502 F. 2d 953.

JURISDICTION

The judgment of the court of appeals (App. I, *infra*, p. 56a) was entered on August 14, 1974. By orders entered November 1, 1974 and December 3, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the commanding officer of a military base has authority to prohibit political speeches on the base.

2. Whether the commanding officer of a military base has authority to prohibit the distribution on the base of unauthorized publications without his prior approval.

STATUTE AND REGULATIONS INVOLVED

18 U.S.C. 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

Army Regulation 210-10, ¶ 5-5 provides in part:

* * * * *

> c. *Restrictions on disseminations of publications.* If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.
>
> * * * * *
>
> e. *Distribution outlets.* An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the

publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Army Regulation 360-61 provides:

2-1. *General.* The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2-3.

2-2. *Restrictions.* a. Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indorse or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purposes of this regulation—

(a) Providing use of Government facilities, such as transportation, housing, or messing, at Government expense is considered a form of Army participation.

* * * * *

Fort Dix Regulation 210-26, ¶ 2(a) provides:

Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

Fort Dix Regulation 210-27 provides in part:

2. *PROPER PRACTICES*: The distribution or posting of handbills, circulars, pamphlets or other writings or publications issued by commanders and staff agencies relating to the performance of their respective missions is authorized.

3. *PROHIBITED PRACTICES*:

a. The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters.

* * * * *

5. *ADMINISTRATIVE INSTRUCTIONS*:

a. Fort Dix Regulation 210-6 controls the issuance of authorizations for the conduct of business by private concerns on the reservation. Individuals not specifically covered within the cited regulation will be referred to the Adjutant General, this headquarters.

b. Fort Dix Regulation 600-18 governs fund-raising activities on the reservation.

c. AR 28-85 and DA Pamphlet 28-30 govern the operation of the Special Services Army Library Service.

d. Persons requesting information about the sale or distribution of commercial magazines or commercial newspapers should be directed to the Post Exchange Officer.

e. AR 360-81 governs the publication of Armed Forces newspapers internally or as civilian enterprise publications.

f. This regulation does not apply to publications of nonappropriated funds, sundry funds and private associations which have been established in accordance with applicable Army regulations.

STATEMENT

This action was brought to enjoin the Army from enforcing its regulations governing political campaigning and the distribution of literature within Fort Dix, New Jersey. The plaintiffs were four candidates of the People's Party and the Socialist Workers Party for the offices of President and Vice President of the United States in the 1972 election, the Socialist Workers Party itself, and four other individuals who had been barred from entering Fort Dix because of their distribution of unauthorized pamphlets on the base.

Fort Dix comprises fifty-five square miles ceded by the State of New Jersey to the Federal Government. The State retains only the right to serve civil process and maintain easements over four county roads that run through the base (App. A, *infra*, pp. 3a-4a). The base is located in a rural area 18 miles from Trenton, New Jersey. Although sentries are not normally posted at the gates, the provost marshal patrols all interior roads on a twenty-four hour basis. "No Trespassing" signs are posted along the one state highway which passes through the post (App. 95a-96a).[1]

In September 1972, the four plaintiff candidates wrote to General David, the Commander of Fort Dix, announcing that they intended "to visit Fort Dix to campaign among the servicemen and servicewomen there" (App. 14a). General David replied that the candidates would not be permitted to campaign on Fort Dix, explaining that (App. 16a):

> There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210-26). The distribution of literature without prior approval of this headquarters is also prohibited (Fort Dix Regulation 210-27). Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibit them from appearing at public demonstrations in uniform.
>
> The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men spend a period of eight weeks here during which they perform their

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[1] "App." refers to the appendix filed in the court of appeals. "App. E" refers to the exhibit volume filed in the court of appeals.

> training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions.
>
> To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity. I feel that I am prohibited from doing this for any candidate for public office.

Nevertheless, candidates Spock and Pulley approached the base on September 23, 1972, where a group of approximately sixty onlookers were waiting (App. 8a, 105a). An officer acting on General David's behalf refused to allow the candidates to enter Fort Dix.

The four other plaintiffs had each been evicted from Fort Dix between 1968 and 1972 after they had been found distributing unauthorized pamphlets on the base which had not been submitted for prior approval to the base commander. The various pamphlets discussed military discharges, protested the Vietnam War, and advertised a planned anti-war demonstration (App. 10a). These plaintiffs were each barred from returning to Fort Dix and advised that reentry would violate 18 U.S.C. 1382.

This action was commenced on September 29, 1972, against General David and the Secretary of Defense. Plaintiffs sought a declaration that the two Fort Dix Regulations pursuant to which General David had

acted (Nos. 210-26 and 210-27) violated the First and Fifth Amendments and an injunction directing the defendants to admit the plaintiffs to Fort Dix and preventing them "from interfering in any way with Plaintiffs' exercise of their First Amendment rights on the Base both before and after the 1972 election" (App. 12a). The plaintiffs also moved for a preliminary injunction.

Following a hearing, the district court denied a preliminary injunction (App. A, *infra*, p. 8a). The court of appeals reversed and directed that a preliminary injunction be entered in favor of the four plaintiff candidates, but not the four other plaintiffs who sought to distribute literature (App. B, *infra*, pp. 30a-31a). This Court, dividing five-to-four, denied a stay of that order (409 U.S. 971; App. C, *infra*, p. 33a).

The district court then entered a preliminary injunction allowing the four candidates to campaign on the unrestricted areas of Fort Dix, but subject to limitations respecting time, place, and number of persons involved, to prevent interference with military functions and military and civilian traffic (App. D, *infra*, pp. 34a-35a). The injunction also barred the military from requiring prior approval of any of the candidates' communications. By a supplementary order, the candidates or their representatives (not to exceed 25 persons at one time) were authorized to distribute campaign literature during designated times at post exchanges, family housing areas, movie theatres, and the main commissary (App. E,

infra, pp. 36a-38a). In addition the Army was ordered to provide the candidates with a specific theatre parking lot to conduct campaign activities on the afternoon of Saturday, November 4, 1972.

As these orders authorized, candidate Spock spoke to a crowd of 100 to 200 at Fort Dix, and his campaign literature was distributed there. Although no violent or disruptive incident occurred during the rally, 30 to 40 military personnel attended the rally in uniform and some of them held campaign placards, in violation of Army Regulation 600-20, ¶ 5-29, which prohibits active participation in partisan political campaigns and permits attendance as a spectator at political meetings and rallies only when not in uniform (see App. E 59). In addition, it was necessary that 54 military personnel perform traffic control and stand-by police duty (App. 262a).

On June 22, 1973, the district court entered a permanent injunction in favor of the four plaintiff candidates and the four other plaintiffs who sought to distribute literature (App. G, *infra*, pp. 44a-46a). The court noted that the plaintiffs all desired to continue their activities at Fort Dix (App. F, *infra*, pp. 40a-41a).[2] Based upon evidence of the costs of alternative methods of communicating with Fort Dix personnel (magazine and radio advertisements and direct mailing), the court found that the $10,000 ju-

[2] Because plaintiff candidates Jenness and Pulley were below the constitutional age limit for the offices they had sought, however, the complaint was dismissed as to them (App. F, *infra*, pp. 40a-41a).

risdictional amount requirement of 28 U.S.C. 1331 (a) had been met by each plaintiff.

The district court enjoined the Army from interfering with political campaigning or the distribution of literature upon the unrestricted areas of Fort Dix, which are open to the civilian public (App. G, *infra*, pp. 44a-45a). The order permits the Army to restrict areas of the base to military personnel and to regulate the time, place, and number of candidates or pamphleteers "as shall be shown by defendants to be necessary to prevent interference with the military mission of the Base and the flow of military and civilian traffic" (App. G, *infra*, p. 45a). The injunction also bars the Army from enforcing its regulations barring all political speeches on base and requiring prior approval of literature distributed on the base. The court of appeals affirmed (App. H, infra, p. 47a).

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions regarding the Army's authority to restrict political activity by civilians on military bases: whether the commanding officer of a military base has authority to prohibit (1) political speeches on the base and (2) the distribution of unauthorized publications there without his prior approval. The regulations of the commanding officer of Fort Dix imposing those restrictions are typical of those in effect at most military bases throughout the country. Army Regulation 306-61, *supra*, p. 4, prohibits Army participation and cooperation (defining "participa-

tion" to include the use of Army facilities) with political groups which directly or indirectly benefits, or appears to benefit, those groups. Army Regulation 210-10, ¶ 5-5(e), *supra*, p. 3, authorizes base commanders to require approval before unauthorized publications may be distributed on base.[3]

By affirming the district court's injunction prohibiting the Army from interfering with either political campaigning or the distribution of unapproved literature in areas of Fort Dix open to the civilian public, the court of appeals encroached upon both the "unquestioned authority which commanding officers of military installations have exercised throughout * * * history," *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 892, and the maintenance of political neutrality vital to the preservation of the Army's independence and integrity. Cf. *Parker* v. *Levy*, No. 73-206, decided June 19, 1974. While this case grew out of political activities in the 1972 election, the court's injunction has continuing effect, and the controversy remains very much alive. The injunction applies to political speeches for any elective office, and the distribution of any literature—including that which is unrelated to particular elections. A decision with such significant effect as to drastically reduce the authority of military commanders to maintain proper order and discipline

[3] While we disagree with the court's holding that plaintiffs here satisfied the $10,000 minimum jurisdictional amount under 28 U.S.C. 1331, we are not here challenging that ruling.

within military installations mandates review by this Court.

1. The court of appeals' holding that the First Amendment prohibits the commanding officer from barring all political speeches at Fort Dix is at odds with decisions of this Court which have recognized "the different character of the military community and of the military mission [which] require[s] a different application of [First Amendment] protections." *Parker* v. *Levy*, *supra*, slip op. at 23. Cf. *Burns* v. *Wilson*, 346 U.S. 137, 140; *Toth* v. *Quarles*, 350 U.S. 11, 17; *Orloff* v. *Willoughby*, 345 U.S. 83, 94. " 'In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. * * * Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command.' " *Parker* v. *Levy*, *supra*, slip op. at 24, quoting *United States* v. *Priest*, 21 U.S.C.M.A. 564, 570; 45 C.M.R. 338, 344.

It is vitally important that the Army be able to maintain both the reality and the appearance of political neutrality, especially in regard to the support of particular candidates for elective office. The court's injunction, however, virtually forces the Army to become directly entangled in electoral politics.

As Dr. Spock's rally demonstrates, the making of political speeches on military bases almost certainly will induce some servicemen to violate valid regulations prohibiting their attendance at political meetings when in uniform and prohibiting their active par-

ticipation in partisan activities under any circumstances. Cf. *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548. It also requires that the Army use its personnel to provide police and traffic control support for the candidates.

Moreover, as General David stated in refusing to permit the candidates to campaign on the base, such campaigning "could also give the appearance that you or your campaign is supported by me in my official capacity" (App. 16a). Finally, as this Court noted in *Lehman* v. *City of Shaker Heights*, No. 73-328 (decided June 25, 1974), with regard to political advertising on a city's rapid transit system, "[t]here could be lurking doubts about favoritism, and sticky administrative problems might arise in parcelling out limited space to eager politicians." Slip op. at 6. In short, the advent of campaign rallies at military bases cannot help but undermine public confidence in the political neutrality of the armed services and involve the Army in delicate judgments about facilities and support personnel to be provided particular political candidates for such purposes.

As the Court noted in *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 890, the commander of a military base necessarily must have complete authority to control access to the base, including authority to exclude from it any or all civilians.[4] The fact that civilians are normally permitted

[4] See also *Holdridge* v. *United States*, 282 F.2d 302 (C.A. 8); *Weissman* v. *United States*, 387 F.2d 271 (C.A. 10); *United States* v. *Jelinski*, 411 F.2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Bridges* v. *Davis*, 443 F.2d 970 (C.A. 9), certiorari denied, 405 U.S. 919.

on non-restricted areas of the base does not diminish the commander's authority to exclude them when he deems it appropriate, nor does it give civilians an unfettered right to hold political meetings or make political speeches on the base. The government "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida*, 385 U.S. 39, 47-48. The government may legitimately prohibit political rallies from occurring on premises where such meetings would be incompatible with the official uses to which the premises are put. "The rights of free speech and assembly * * * do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana*, 379 U.S. 536, 554.

The court of appeals erred in ruling that *Flower* v. *United States*, 407 U.S. 197, compelled the conclusion that General David could not prohibit political campaigning on the base. In *Flower*, the Court summarily reversed a conviction under 18 U.S.C. 1382 for distributing leaflets within the boundaries of Fort Sam Houston after the distributor had been barred from the post for similar distributions. Unlike the instant case, however, the distribution in *Flower* took place on an "important traffic artery" which passed through the Fort and over which more than 17,000 civilian vehicles traveled during 24 hours of each

day without interference from the military. The sidewalks of the street were used extensively at all hours by civilians, and there was no sentry post or guard at either entrance of the street to the Fort or along the route.

This Court ruled that "[u]nder such circumstances the military has abandoned any claim that it has a special interest in who walks, talks, or distributes leaflets on the avenue." 407 U.S. at 198. By contrast, Fort Dix is located in a rural area, the provost marshal of the base patrols all roads on a 24-hour basis, and "No Trespassing" signs are conspicuously posted (App. 95a-96a). The Army has not, therefore, "abandoned any claim" to control the areas of Fort Dix open to the public.

Moreover, while in *Flower* the distribution of leaflets may have been directed primarily at civilians passing on the public avenue, respondent candidates in the instant case avowedly sought to "visit Fort Dix to campaign among the servicemen and servicewomen there" (App. 14a). Indeed, the court's injunction in the instant case applied to all non-restricted areas of the base, not merely the four county roads that cross the base.[5]

The court of appeals apparently read *Flower* as establishing the broad principle "[i]f the reservation is open to all the rest of the public, there is no basis

[5] In addition, while *Flower* sought merely to distribute handbills, respondent candidates sought to conduct political rallies and make political speeches—activities that necessitate direct Army involvement.

for holding that it may be closed, selectively, to political candidates or to distributors of unapproved literature" (App. B, *infra*, p. 24a).[6] The fact that civilians are admitted to non-restricted areas of the base for certain purposes, however, does not mean that they have an unfettered right to hold political rallies on the base. As this Court noted in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569, "property does not lose its private character merely because the public is generally invited to use it for designated purposes." The non-restricted areas of Fort Dix do not provide an "open-ended invitation to the public to use [the Fort] for any and all purposes." *Id.* at 565. See also, *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 338 (White, J., dissenting), quoted with approval in *Lloyd Corp.* v. *Tanner*, *supra*, 407 U.S. at 565.

In invalidating the regulation banning all political speeches the court of appeals found that the Army had created only a "feigned neutrality," stating that "[w]hat the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently will-financed to attract media coverage * * *" (App. B, *infra*, p. 29a). But the fact that political information reaches

[6] Several other courts have also read *Flower* as establishing a broad right of public access to military bases. See *Burnett* v. *Tolson*, 474 F.2d 877 (C.A. 4); *CCCO-Western Region* v. *Fellows*, 359 F. Supp. 644 (N.D. Cal.).

military personnel through the printed[7] or broadcast media does not mean that the military cannot validly prohibit the quite different activities associated with personal campaigning on a military base. There was unchallenged testimony that no political candidate had campaigned at Fort Dix prior to Dr. Spock's appearance there (App. 70a).[8] All candidates, of course, are free to present their views in person to military personnel by conducting their political rallies just outside the military gates (see App. 47a-48a).

Finally, the court's order permitting partisan political speeches on the base may well infringe the First Amendment rights of military personnel who, because they are on the base "as a matter of necessity, not of choice," lack any "choice or volition" about whether to witness such campaigning. *Lehman* v. *City of Shaker Heights*, *supra*, slip op. at 4, quoting from *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 468, and *Packer Corporation* v. *Utah*, 285 U.S. 105, 110. Because "within the military community there is simply not the same autonomy as there is in the larger civilian community," *Parker* v. *Levy*, *supra*, slip op. at 16, military personnel comprise what amounts to a "captive audience" for political candidates who come to the base to make political speeches. As this Court stated in *Lehman*, *supra*, however, the First Amendment does not require that "military compounds, and other public facilities * * * become Hyde Parks open to every would-be pamphleteer and politician." Slip op. at 6. Indeed, the concern for the First Amendment rights of captive recipients of political messages which the Court expressed in *Lehman*, dealing with advertising space in rapid transit vehicles, is even more directly implicated when, as here, the political message is thrust upon recipients in the form of political rallies and speeches.

[7] See n. 10, *infra*.

[8] Compare *Jenness* v. *Forbes*, 351 F. Supp. 88 (D. R.I.); *Butler* v. *United States*, 365 F. Supp. 1035 (D. Hawaii).

2. The court of appeals' holding that the First Amendment prohibits a ban on the distribution of publications in non-restricted areas of Fort Dix without prior approval of the commanding officer likewise is at odds with decisions of this Court recognizing that the First Amendment has a different scope when applied to the military than in civilian life, *Parker* v. *Levy*, *supra*, and that the government may limit certain forms of political expression incompatible with the purposes for which particular government facilities are used, *Adderley* v. *Florida*, *supra*. Our arguments advanced in Point 1 above, with regard to partisan political speeches, are equally applicable with regard to the distribution of literature.

Here, moreover, the Army did not impose a total ban on the distribution of pamphlets. The Fort Dix regulation merely required that the base commander give his prior approval to publications before they were distributed on base. Plaintiffs failed to obtain such approval. Indeed, pursuant to Army Regulation

210-10, ¶ 5-5, a base commander must grant approval to any distribution unless he finds that the "publication constitutes a clear danger to military loyalty, discipline, or morale" (App. E 54).[9] Army Regulation 210-10 also provides for prompt review by the Department of the Army of any decision by a post commander to bar distribution (App. E 54-55). The ruling of the court of appeals would therefore vitiate the base commander's authority to prevent such clearly dangerous publications from being distributed to military personnel under his command, unless he were to take the drastic step of closing the entire base to civilians.[10]

This Court has repeatedly recognized the validity of prior restraints on communications in situations

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[9] The Army Directive on Guidance on Dissent emphasizes that a "commander may not prevent distribution of a publication simply because he does not like its contents" or because it "is critical—even unfairly critical—of government policies or officials * * *" (App. E 47). The Directive indicates that only those publications which are obscene or which counsel disloyalty, mutiny, or refusal of duty can be barred (App. E 47).

[10] The "clear danger" test also applies to materials distributed through official outlets, such as the Post Exchange. While no prior approval is required for the distribution of such materials, a post commander may delay distribution of a specific periodical if he finds the specified "clear danger." If the Department of the Army agrees, distribution can be prohibited (see Army Regulation 210-10, *supra*, p. 3). Of course, established publications—unlike most pamphlets distributed by civilians—have past issues which normally provide a clear indication whether their next issue is likely to present a "clear danger" to the military.

where otherwise unchecked communications could be dangerous to institutional security. Thus in *Pell* v. *Procunier*, No. 73-918 (decided June 24, 1974), and *Saxbe* v. *Washington Post*, No. 73-1265 (decided June 24, 1974), the Court acknowledged that the First Amendment rights of civilians were necessarily subordinate to the legitimate needs of state and federal prisons to place limits on public access to individual inmates. By the same token, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline" in the military, *Parker* v. *Levy*, *supra*, slip op. at 23, requires that a base commander have authority to prevent civilians from distributing publications which pose a "clear danger to military loyalty, discipline, or morale." Cf. *Poulos* v. *New Hampshire*, 345 U.S. 395, 405.

Furthermore, the governmental function at stake in this case is not the police power to control civilian activities on public streets, parks, and walkways, where prior restraints on First Amendment rights must bear a heavy presumption against their constitutional validity. What is at stake is, rather, "the governmental function * * *, as proprietor, to manage the internal operation of an important federal military establishment. * * * In that proprietary military capacity, the Federal Government * * * has traditionally exercised unfettered control." *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*, 367 U.S. at 896. The civilian public has no absolute First Amendment rights within such military facilities where the military has not, as in *Flower*, *supra*,

"abandoned its claim" to the premises. Indeed, the government could exclude all civilians from the base.[11]

The requirement that publications be approved prior to their being distributed by civilians on the base is not an impermissible prior restraint upon the First Amendment rights of such civilians. On the contrary, the requirement is an appropriate exercise of military authority designed to assure that any civilian who enters the military facility intending to distribute literature will not pose a "clear danger" to military loyalty, discipline, or morale. *Cafeteria & Restaurant Workers Union, supra*; *Holdridge* v. *United States, supra*; *Weissman* v. *United States, supra*; *United States* v. *Jelinski, supra.*[12]

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[11] See *supra*, p. 14.

[12] The injunction is further improper in that it rescinds the bar order against one pamphleteer whose conduct was not protected by the First Amendment even under the rationale of the court of appeals. Plaintiff Stanton was barred from Fort Dix because he had distributed leaflets in a barracks (App. 10a, 112a), a restricted area not open to the civilian public (App. 87a-88a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1975.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed October 12, 1972)

BENJAMIN SPOCK, JULIUS HOBSON, LINDA JENNESS, ANDREW PULLEY, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY, ROBERT STANTON, PLAINTIFFS

vs.

BERT A. DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense, DEFENDANTS

OPINION

FISHER, District Judge

Plaintiffs seek a preliminary injunction ordering defendants from enforcing several Army and Post Regulations which they claim deprives them of their First Amendment rights to make political addresses and to pass out literature in the military confines of Fort Dix.

These allegations are sufficient to establish jurisdiction under 28 U.S.C. Sec. 1331. The application will be decided on stipulated facts, affidavits supplied by the parties and testimony and documents received into evidence at the hearing on October 4, 1972.

The plaintiffs' situations fall into two categories. Generally one group of complainants seek to enter the base as political candidates to hold rallies and make political speeches. They are Benjamin Spock and Julius Hobson, Presidential and Vice-Presidential candidates of the Peoples Party and Linda Jenness and Andrew Pulley, candidates for the same offices on the Socialist Workers Party Ticket.

The second category of plaintiffs is composed of members of anti-Viet Nam conflict groups and draft education and conscientious objector organizations who seek relief from being banned from the military installation at Fort Dix. They are John Ginaven, Donald Misch, Alan Hardy and Robert Stanton, who attempted to and still desire to distribute leaflets at the Fort. Although their intended activities are different, it is interesting to note that they ally themselves in this litigation.

Candidates Spock, Hobson, Jenness and Pulley wrote a letter dated September 9, 1972 to General David, Commanding General at Fort Dix, advising him that on September 23, 1972 they intended to enter the Fort to distribute campaign literature and hold a meeting with service personnel. In the letter they agreed to time and place designated by the defendants. On September 18, 1972 General David responded by letter refusing the request giving the following reasons:

1. Fort Dix Regulation No. 210-26, April 9, 1968, prohibiting demonstrations, picketing, political speeches and the like on the base.

2. Fort Dix Regulation No. 210-27 prohibiting distribution of literature not previously approved as to content.

3. Department of the Army Regulations which prohibit military personnel from participating in any partisan political campaign.

4. Interference with the duties of the military personnel.

5. The Commanding General would appear partisan, if he allowed campaigning.

Undaunted, the candidates then informed General David that they intended to walk on the base to campaign on September 23, 1972 at 11:00 A.M. through the entrance to Fort Dix just outside Wrightstown, N.J. When they arrived, they were refused admittance.

The other plaintiffs who had been distributing literature on the Fort at various times (Stanton as long ago as 1968) were apprehended, evicted and given notice that they were barred from the base.

Fort Dix is a military reservation not far from Trenton, N.J. and located in a rural area. It covers fifty-five square miles and has seven main entrance ways. The roads leading into Fort Dix are not covered by guards or barriers. Apparently, because of the cut-back in personnel and inaccessibility of the military installations, it has not been deemed necessary to establish these precautions.

When the land which the base covers was ceded by the State of New Jersey to the Federal Govern-

ment the only reservations were easements over four roads for transportation and the right to serve civil process on the reservation. The Provost Marshal maintains five to eight patrols around the clock throughout the post and keeps control over all roads and all areas.

The primary military mission at Fort Dix is training. It is an Infantry Center. At present there are two basic combat training and one advanced individual training brigades encamped. These units train from five days to five and one-half days per week. Other specialty training is also conducted. Over 10,000 personnel were engaged in training activities on September 23, 1972. The vast majority of the geographical area of the Reservation is devoted to training activities.

In addition to trainees, approximately 6,080 people are living on the post in family units and 2600 civilians are employed on the base. There are civilian concessions allowed on the grounds as a service to both the military and the civilian employees.

A 1970 traffic check, which has not been brought up to date, discloses a great volume of both civilian and military vehicular traffic in and out of Fort Dix.

Plaintiffs contend that the right to campaign on the military reservation and to pass out leaflets is protected by the First Amendment as defined in the cases of *Flower* v *United States*, 407 U.S. 197 (1972) and *Jenness* v *Frame*, —— F. Supp. —— (D.R.I. 1972).

In *Flower, supra,* the petitioner was distributing leaflets advertising a debate at a local college on New Braunfels Avenue, a street within the limits of Fort Sam Houston, Texas. He had previously been removed from the post and barred therefrom. He was charged with a violation of 18 U.S.C. 1382, convicted in the District Court and sentenced to six months in prison. The Fifth Circuit Court of Appeals affirmed (one judge dissenting) but the Supreme Court reversed. New Braunfels Avenue was an unguarded arterial highway, freely used by vehicles twenty-four hours a day. Traffic on the road was heavy, being used by buses, taxis and other public transportation as well as private automobiles. Further the sidewalks were used extensively by civilians as well as military personnel. There is nothing in the two opinions which would indicate any control of New Braunfels Avenue by the military. In a short *per curiam* opinion the Supreme Court (three justices dissenting) held:

> "*Under such circumstances* the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commandant can no more order petitioner off of this public street because he was distributing leaflets than could the city police order any leafleteer off any public street. Cf. Lovell v City of Griffin, 303 U.S. 444 (1938), Schneider v State, 308 U.S. 147 (1939). '(S)treets are natural and proper places for the dissemination of information and opinion,' 308 U.S. at 163. '(O)ne who is rightfully on a street

which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' Jamison v Texas, 318 U.S. 413, 416 (1943).

The First Amendment protects petitioner from the application of Sec. 1382 under conditions like those of this case. Accordingly, without need to set the matter for further argument, we grant the petition for a writ of certiorari and reverse the conviction." (Emphasis supplied) 407 U.S. at p. 198-199.

In *Jenness*, *supra*, the District Court in a case like this one at hand and with some of the same plaintiffs as here involved, held that the Commanding Officer at Quonset Point Naval Air Station could properly refuse to permit political activity in the restricted and fenced areas of the base but then decided that the First Amendment required plaintiffs to be permitted to campaign in the non-restricted family housing area.

It is settled that a commanding officer of a military or a naval installation can summarily exclude civilians from the area of command. *Cafeteria Workers* v *McElroy*, 367 U.S. 886 (1961). Additionally, there is no violation of First Amendment rights in prohibiting demonstrations on public owned property not designated for general public use. *Adderley* v *Florida*, 385 U.S. 39 (1966); *Cox* v *Louisiana*, 379 U.S. 559 (1965). Further, in a case decided just ten days after *Flower*, *supra*, Justice Powell speaking for the Court in *Lloyd Corp.* v *Tanner*, 407 U.S. 551

(1972) held that a shopping mall management could prevent anti-war pamphleteering on its property because the Court has never held that a trespasser or an uninvited guest could exercise general rights on private property, significantly adding, ". . . Even where public property is involved, the Court has recognized that it is not necessarily available for speech, pickets or other communicative activities". 407 U.S. at p. 568.

It is clear that the First Amendment rights of the plaintiff must be carefully weighed against the interests of the military in prohibiting political activity in the confines of the base and other exercises inimical to the military mission at Fort Dix. The reasoning behind the Regulations here involved is apparent. Aside from urging its personnel to vote, clearly a healthy motive, the military must remain politically antiseptic. This has been the policy of the armed forces throughout the history of the Republic. Further, to allow activity on the military reservation which would interfere with the mission of the Command makes no sense whatsoever.

Plaintiffs' confidence in the holding in *Flower*, *supra*, is misplaced. That case, as indicated heretofore, dealt with a street on a military reservation which for all intents and purposes had become like any other municipal thoroughfare. It had, in the view of the Supreme Court, been "abandoned" by the military.

In this case, the Command has not "abandoned" control over any part of Fort Dix. Although civilian

vehicles are allowed across some four of its roads, the Military Police has jurisdiction and authority over all criminal offenses and traffic violations throughout the base and as the testimony of the Provost Marshal disclosed, exercises it.

Therefore, in my view, *Flower, supra,* was never intended to apply to the situation in which we are here involved. *Jenness* v *Frame, supra,* has been offered to persuade me to plaintiffs' position. There is much agreement between this Court and the opinion of the learned District Court in *Jenness,* but insofar as that court has extended the *Flower* decision, I respectfully decline to follow.

The application by plaintiffs for a preliminary injunction is denied.

Defendants have moved for a severance of the candidates' cases from those of the pamphleteers. In view of the foregoing I need not determine the efficacy of that application at this time.

Submit an order.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1934

BENJAMIN SPOCK; JULIUS HOBSON; LINDA JENNESS; ANDREW PULLEY; SOCIALIST WORKERS PARTY; JOHN GINAVEN; DONALD MISCH; ALAN HARDY and ROBERT STANTON, APPELLANTS

v.

BERT A. DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense

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(D.C. Civil No. 1621-72)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6)
October 17, 1972

Before GIBBONS and ROSEN, *Circuit Judges,*
and LAYTON, *District Judge*

OPINION OF THE COURT

(Filed October 27, 1972)

GIBBONS, *Circuit Judge.*

This is an appeal authorized by 28 U.S.C. § 1292 (a)(1) from an order of the district court refusing a preliminary injunction. It is before this panel as a result of the appellants' motion for an injunction pending appeal pursuant to Rule 8(a) Fed. R. App. P. or in the alternative for expedited consideration of the appeal. We granted the alternative motion for expedited consideration and the case was submitted without oral argument pursuant to Local Rule 12(6).

The appellants, plaintiffs below, are in two categories. Spock and Hobson are, respectively, candidates of the People's Party for President and Vice President of the United States in the election to be held on November 7, 1972, Jenness and Pulley are, respectively, the candidates for President and Vice President of the Socialist Workers Party. That organization, a national political party, is also a plaintiff. The Socialist Workers Party, Spock, Hobson, Jenness and Pulley, will be referred to collectively as the candidates. Ginaven, Misch, Hardy, and Stanton are individual political activists who in the past have distributed leaflets within the Fort Dix Military Reservation, in New Jersey, and who have, as a result of that activity received from the Commanding Officer of that base letters ejecting them from Fort Dix and barring their reentry. These bar orders are

enforced by the sanction of 18 U.S.C. § 1832.[1] Ginaven, Misch, Hardy and Stanton will be referred to collectively as the barred pamphleteers. The appellee David is the Commanding Officer of the Fort Dix Military Reservation, and the appellee Laird is the Secretary of Defense. On September 29, 1972, the candidates and the barred pamphleteers filed a one count complaint seeking injunctive relief in aid of the exercise of claimed first amendment rights both before and after the 1972 election.

The candidates alleged that on September 9, 1972, they had written a joint letter to David advising him of their intent to enter Fort Dix on September 23, 1972, for the purpose of distributing campaign literature and of holding a meeting to discuss election issues with service personnel and their dependents. The letter expressed their willingness to confine their campaigning to such times and places as might be designated by David. On September 18, 1972 David replied by a letter which advised the candidates that their request to visit Fort Dix and campaign was denied. The letter referred to Fort Dix Regulation

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[1] "Whoever, within the jurisdiction of the United States goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500 or imprisoned not more than six months, or both."

No. 210-26 [2] which, he said, prohibits political speeches and similar activities on all of the Fort Dix Military Reservation. It also referred to Fort Dix Regulation No. 210-27 [3] which, he said, prohibits the distribution of literature without the prior approval of headquarters. The letter also advised that any person entering Fort Dix for the purposes prohibited by Regulations 210-26 and 210-27 would violate 18 U.S.C. § 1382. On September 23, 1972, candidates Spock and Pulley went to Fort Dix, where an officer acting on David's behalf refused to admit them to the base and prevented their entrance.

The barred pamphleteers each allege that at various times in the past each was peacefully distributing literature on the base, each was taken into custody and ejected from the base, and each received a letter barring him from the military reservation in the future and warning that reentry might constitute a violation of 18 U.S.C. § 1382.

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[2] "2. *PROHIBITED PRACTICES:*

a. Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation."

[3] "3. *PROHIBITED PRACTICES:*

a. The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without proper written approval of the Adjutant General, this headquarters."

With the complaint was filed a motion for a preliminary injunction, an expedited hearing and an order to show cause. The district court issued an order directing the defendants to show cause on October 6, 1972, why a preliminary injunction should not be issued. On October 4, the United States Attorney filed three affidavits in opposition to the preliminary injunction and a motion pursuant to Fed. R. Civ. P. 20(b) for an order severing the candidate plaintiffs from the barred pamphleteer plaintiffs. No answer has been filed, and the district court has not yet ruled upon the severance motion. An evidentiary hearing was held on the return day of the order to show cause, and on October 12, 1972, the district court filed an opinion denying the application for a preliminary injunction. An order to that effect was signed on Ocotber 13, 1972, and this appeal followed.

JURISDICTION

We are confronted at the outset with the appellees' contention that the appeal should be dismissed for lack of federal jurisdiction. The district court opinion states, without discussion, that the allegations of the complaint are sufficient to establish jurisdiction under 28 U.S.C. § 1331. The jurisdictional statement of the complaint refers to 28 U.S.C. § 1331, § 1343 and § 1361, and to several other federal statutes [4] of a non-jurisdictional character. 28 U.S.C. § 1343 is inapplicable. It deals only with state action. This

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[4] 5 U.S.C. § 701 *et seq.*; 42 U.S.C. § 1972.

case involves actions taken solely on federal authority. 28 U.S.C. § 1361 is one of the grants of federal jurisdiction to which no jurisdictional amount is attached. But by no fair reading could the complaint be construed as alleging an action in mandamus to compel David and Laird to perform a duty owed to the plaintiffs. Under plaintiffs' theory in the complaint defendants are acting outside of their authority. It sets forth a suit in equity for an injunction against interference with civil rights protected by the first amendment. The only basis for federal jurisdiction is the general grant of federal question jurisdiction found in 28 U.S.C. § 1331, and to that grant Congress has attached a jurisdictional amount. *See Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 547 (1972). The complaint does contain the allegation that the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs, but that mere allegation does not end the inquiry. *E.g.*, *Tanzymore* v. *Bethlehem Steel Corp.*, 457 F.2d 1320 (3d Cir. 1972); *Nelson* v. *Keefer*, 451 F.2d 289 (3d Cir. 1971).

It may seem incongruous that if a state officer such as the Commanding Officer of a National Guard base were charged with violations of first amendment rights there would be federal jurisdiction regardless of jurisdictional amount, *see Lasher* v. *Shafer*, 460 F.2d 343 (3d Cir. 1972), but that when a federal officer is so charged the plaintiff must assume the added burden of establishing that the matter in controversy exceeds the sum or value of $10,-

000.00. Some courts and commentators have suggested that Congress cannot constitutionally require that more than $10,000.00 be in controversy if the effect is to bar any federal judicial review of a constitutional claim. *See Cortright* v. *Resor*, 325 F. Supp. 797, 808-81 (E.D.N.Y.), *rev'd* on other grounds, 447 F.2d 245, 250-51 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); *Murray* v. *Vaughn*, 300 F. Supp. 688, 695 (D.R.I. 1969); Note, *The Constitutional Implications of the Jurisdictional Amount Provision in Injunction Suits Against Federal Officers*, 71 Colum. L. Rev. 1474 (1971); *cf. West End Neighborhood Corp.* v. *Stans*,[5] 312 F. Supp. 1066, 1068 (D.D.C. 1970). *Compare* the above with *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970). That view, however, is hardly consistent with the history of federal question jurisdiction. The lower federal courts had no general federal question jurisdiction until the Judiciary Act of 1875. Prior to 1875 the enforcement of the Bill of Rights was the responsibility of the state courts, subject only to review of their decisions by the Supreme Court. When the lower federal courts were first granted federal question jurisdiction a jurisdictional amount requirement was attached, and such a requirement has remained ever since. The jurisdiction of the state courts, however,

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[5] While the District Court for the District of Columbia is an Article III Court, 28 U.S.C. §§ 88, 132, it also has the jurisdictional attributes of a state court. *See* 2A Moore, Federal Practice ¶ 8.07 [3], at 1640 (2d ed. 1968).

was in no way affected by the grant to federal courts of concurrent jurisdiction in federal question cases. In this case, for example, David could have been sued in the state courts of New Jersey. He would undoubtedly have removed to the federal courts pursuant to 28 U.S.C. § 1442(a)(1), since the suit is for acts which were done under color of his federal office. In the removed action the jurisdictional amount requirement would have been inapplicable because § 1442 is a separate jurisdictional grant without regard to amount in controversy. *Willingham* v. *Morgan*, 395 U.S. 402 (1969); *Venable* v. *Richards*, 105 U.S. 636 (1882). But if he did not elect to remove, the suit could proceed in the state court. The availability of that remedy would probably suffice to answer any contention that Congress could not constitutionally impose a jurisdictional amount requirement applicable to civil rights cases against federal officers. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1401 (1953). In any event, that constitutional issue, if it is one, does not seem to concern the Supreme Court, for it recently said:

> "Thus, for example, in suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction. See *Ostereich* v. *Selective Service Board*, 393 U.S. 233; *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388." *Lynch* v. *Household Finance Corp.*, *supra*. at 547.

The plaintiffs must, then, meet the amount-in-controversy requirement.

The Government contends, relying principally upon *Hague* v. *CIO*, 307 U.S. 496 (1939), that the rights of freedom of speech and assembly are of such a nature as not to be susceptible of valuation in money and are thus beyond the reach of the jurisdiction conferred by § 1331. There is dicta in Justice Stone's opinion suggesting as much. *Id.* at 527-32. But his was not the opinion of the Court, and the Supreme Court has never so held. The sixth circuit, in *Goldsmith* v. *Sutherland*, *supra*, relying on Justice Stone's dictum, has accepted the Government's position. In addition to *Hague* v. *CIO*, *supra*, the sixth circuit relied, for authority for the proposition that claims of infringement of the right of free speech are incapable of monetary valuation on *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965), and *Carroll* v. *Somerville*, 116 F.2d 918 (2d Cir. 1941). *Giancana* was a complaint based upon an allegedly unlawful surveillance by agents of the FBI. The complaint did not allege and the plaintiff did not show that the allegedly unlawful activities of the agents subjected him to damages in excess of $10,000.00. To the extent that *Giancana* decides anything beyond the failure to allege and show the jurisdictional amount in controversy, it must be regarded as overruled by *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), which holds that a claim for damages for valuation of fourth amendment rights is justiciable under § 1331.

Carroll does not hold that first amendment rights are incapable of valuation. It holds only that the record in that case established the amount in controversy as a specific amount of lost wages, $1,138.80, which was less than the then applicable $3000 jurisdictional amount.

Section 1331 refers both to sum and to value. In cases in which there is an adequate remedy at law, the recovery of damages, the jurisdictional amount must be determined by reference to the sum of those damages. In cases where there is no adequate remedy at law, the measure of jurisdiction is the value of the right sought to be protected by injunctive relief. In some situations the line between the two types of cases tends to blur, as in an action for damages for infringement of fourth amendment rights. *See, e.g., Bivens* v. *Six Unknown Named Agents, supra.* But there are many intangible interests the invasion of which will be quite difficult to value in dollars. One of these is the interest of a Selective Service System registrant in being lawfully classified. That interest obviously must be measured by the intangible value of the proper classification. Though the value of that right may be difficult of precise measure, that difficulty does not make the claim nonjusticiable under § 1331. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (2d Cir. 1967). The federal courts in injunction actions under § 1331 or § 1332 frequently are asked to protect such intangibles as the good will adhering to a trademark. *E.g., Schering Corp.* v. *Sun Ray Drug Co.*, 320 F.2d 72 (3d Cir. 1963); *Ambassador East, Inc.* v. *Orsatti, Inc.*, 257 F.2d 79 (3d 1958). If these intangible interests are sufficiently capable of valuation to meet the jurisdictional amount requirement there is no reason to lay down a rule of law that the rights of free speech and free assembly present nonjusticiable problems of valuation. Thus we cannot say as a legal certainty that the plaintiffs at final hearing will be unable to justify the jurisdictional claims which they have pleaded. We decline to follow *Goldsmith* v. *Sutherland, supra,* insofar as that case suggests the propriety of dismissing for lack of federal jurisdiction.

PRELIMINARY RELIEF AND JURISDICTIONAL AMOUNT

There is, of course, the point that in the hearing on the plaintiffs' motion for a preliminary injunction no proof was offered specifically directed to establishment of the value of the civil rights for which protection is sought. From this the Government urges that the denial of preliminary injunctive relief should be affirmed without going to the merits of the claims. We do not agree. We have rejected the contention that first amendment rights are incapable of valuation and hence nonjusticiable in a § 1331 case. The complaint alleged the requisite jurisdictional amount. When the motion for a preliminary injunction was before the district court on October 6, 1972, the return day of the order to show cause, that allegation had not been traversed either by answer or by affi-

davit. The jurisdictional amount contention was not urged upon the district court. The hearing was directed to the alleged incidents of infringement of first amendment rights and to the justification or lack of justification for those infringements. The district court assumed that jurisdiction of the federal court was not in issue, at least with respect to the preliminary injunction. In these circumstances it was understandable that no effort was made to introduce evidence directed specifically to the value of the claimed rights. This was, after all, not a final hearing, but a hearing on a motion for a preliminary injunction. Since as the record of the district court comes before us the allegation of jurisdictional amount remains untraversed, and we cannot say as a legal certainty that the plaintiffs will never be able to establish their jurisdictional amount claim, we must proceed on the same assumption as did the district court.

Indeed on the evidence in the record it seems at this juncture far more likely than not that the district court will ultimately hold that the value of some of the rights sought to be protected exceeds $10,000.00. Four of the plaintiffs are candidates for the nation's highest political offices. The rights of speech and assembly for which they seek protection are intimately connected with their quest for that office. Just as in an action for unfair competition we would look at the value of the trademark rather than at the extent of the infringement, *Schering Corp.* v. *Sun Ray Drug Co., supra; Ambassador East, Inc.* v. *Orsatti, Inc., supra,* so in a political campaign we should

look at the value of the campaign rather than at the extent of infringement of the constitutionally protected right to pursue it. The claimed jurisdictional amount of the barred pamphleteers may not be quite so clear. Even as to them, however, without suggesting what our final position may be if the case comes before us after final hearing, we cannot say that the view expressed by Judge Weinstein in *Cortright* v. *Resor, supra,* is unreasonable. He wrote:

> "Free speech is almost by definition, worth more than $10,000, so that the allegation of jurisdiction based upon 1331 ought not be subject to denial." 325 F. Supp. at 810.

At this preliminary stage, in the state of the record before us, it seems more likely than not that the appellants will, as the district court assumed, satisfy the jurisdictional amount requirement at final hearing. Thus we reject the jurisdictional amount contention as a basis for denial of preliminary injunctive relief.

THE MERITS OF THE CLAIM

As we have said above, the complaint alleges claims on behalf of two groups with somewhat separate interests, the candidates and the barred pamphleteers. It alleges separate violations which raise two issues. One is applicable to the candidates only. The other is common to both groups. The issue applicable to the candidates only is the legality of barring them from the base because of their status as candidates.

The issue common to both groups is the legality of the prohibition against distributing literature which has not been submitted to the prior restraint of an approval by the Adjutant General of Fort Dix pursuant to Fort Dix Regulation No. 210-27.

Under *Flower* v. *United States*, 407 U.S. 197 (1972), a resolution of these issues requires a description of the Fort Dix Military Reservation. In *Flower* the Court made clear that the power of military authorities to restrict general access to a military facility, recognized in *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961), did not apply to those parts of the facility to which the public has been freely admitted. It reversed Flower's conviction for violation of 18 U.S.C. § 1382. The violation charged was the distribution of leaflets within the boundaries of Fort Sam Houston, San Antonio, Texas, after having been barred from the post for similar distributions. The distribution took place on New Braunfels Avenue which passed through the fort, an open post, and over which 17,740 vehicles a day passed without interference from the military.

The district court held that Fort Dix, unlike Fort Sam Houston, was not an open post. That finding is clearly erroneous. The record establishes that Fort Dix, a reservation of over fifty-five square miles, is crossed by ten paved roads including a major state highway, Route 68, on all of which unrestricted vehicular traffic, civilian as well as military, is permitted at all times. In addition, there are many un-

paved trails. On the paved roads and on the trails unrestricted pedestrian traffic is permitted. Buses, operated as common carriers, use the roads on the base. They pick up and discharge passengers, civilian and military. Civilians are authorized on the post. There are numerous employed civilians. Business concessions are conducted on the post. Civilians are welcome to visit soldiers. Tourists are welcome. Entertainments are occasionally provided at which as many as 5000 people may congregate at a sports arena on the post. Outside chaplains conduct religious services on the post. One can visit the post for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets. The gate at which candidates Spock and Pulley were stopped is on the Wrightstown road, about five feet from the commercial district of Wrightstown. It is normally open and unguarded, but was apparently guarded by representatives of defendant David on September 23, 1972, in anticipation of the visit. A traffic count taken in 1970, the most recent available, disclosed a daily vehicle count through the reservation of 66,000 vehicles. There are a few restricted areas in the reservation, such as the ammunition magazine area and the stockade, but these are either fenced off, or if not fenced off, marked by signs as restricted areas or patrolled by sentries. Only authorized personnel are permitted in the restricted areas, but the remainder of the base is open to the general public, except for political candidates, or persons distributing unap-

proved literature, and except for those persons to whom the commander of the fort has issued a bar order. Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post. *See Jenness* v. *Frame*, Civil No. 4855 (D.R.I., August 10, 1972).

The Federal Government exercises jurisdiction over the entire reservation. Its military policemen enforce traffic regulations and the criminal laws applicable to offenses on federal military reservations. But the fact of the exercise of such jurisdiction does not imply the power to selectively exclude persons solely on the ground of exercise of rights protected by the first amendment. If the reservation is open to all the rest of the public, there is no basis for holding that it may be closed, selectively, to political candidates or to distributors of unapproved literature.

We do not suggest any lack of vitality to the principle announced in *Cafeteria Workers* v. *McElroy*, *supra*. That principle undoubtedly protects from intrusion those areas of Fort Dix which have in fact been closed to the public. *See Adderley* v. *Florida*, 385 U.S. 39 (1966). And it is clear that even on an open post the military authorities are as free as their civil counterparts to impose reasonable regulations to prevent disruption of the primary mission of the facility. *See Cox* v. *Louisiana*, 379 U.S. 559 (1965). But here the record makes clear that distribution of leaflets to military personnel and to the base housing, occupied by military personnel and their dependents, is permitted if the leaflets are first approved as to content. The record makes clear that almost the world-at-

large, with the exception of political candidates, is free to come on the base and talk to persons living and working there. The record makes clear that large assemblies occasionally take place. Thus we cannot find that distribution of leaflets, face to face campaigning, or even the holding of meetings would *per se* be disruptive of the mission of the facility. The military authorities have themselves decided otherwise.

The district court refers to the recent decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), as authority for the denial of the preliminary injunction. That case is not in point. It involved the right of a private owner of a shopping center to issue invitations to his place of business for selected private rather than for public purposes. The case limits *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968) and *Marsh* v. *Alabama*, 326 U.S. 501 (1946). That entire line of cases, however, turns upon the extent to which private parties have, by undertaking functions of a nature generally thought of as public, made themselves subject to the strictures of the first amendment which are ordinarily applicable to governmental actions. *Lloyd Corp.* does not enlighten on the issues presented in this case, which involves governmental action to which the first amendment clearly applies. It is one thing to say that a private landowner may issue invitations to the public for selective purposes and thereby exclude demonstrations from his premises. It is quite another to say that a governmental

official charged with the custody and control of publicly owned lands may issue or withhold such invitations using a classification forbidden by the first amendment. The latter is the charge alleged in this case.

Nor do we imply that the military commander of an open post may not be free to issue bar orders prohibiting some persons from the entire post. The record discloses that such orders have been issued for offenses such as possession of marijuana or narcotics, assault, possession of stolen property, solicitation for prostitution, carrying concealed weapons, traffic offenses, contributing to the delinquency of a minor, impersonating a female, fraud, and unauthorized use of an ID card. For all of these activities bar orders may be appropriate. But bar orders have also been issued for distributing "unauthorized publications." Unauthorized publications are those which have not been submitted to and approved by the Adjutant General, and his approval or disapproval depends upon the content of the message. A more vivid instance of a prior restraint on activities protected by the first amendment can hardly be imagined.

The Government contends that Fort Dix Regulations No. 210-26, which prohibits political speeches, and No. 210-27, which requires approval of the content of publications prior to their distribution, are authorized, at least, if not required by Army Regulation No. 360-61. In relevant part that regulation provides:

"2-1 General. The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2-3.

2-2. Restrictions. a. Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indose or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purpose of this regulation—

(a) Providing use of government facilities, such as transportation, housing, or messing, at government expense is considered a form of Army participation."

This Army Regulation seems on its face inapplicable. The appellants did not seek the use of Government transportation, housing, or messing. They sought the same right of public access as is afforded to the public-at-large. Moreover, even if permitting political campaigning and leaflet distribution in the open areas of Fort Dix were to be considered to be the provision of Government facilities, it stretches credulity to assume that permitting such use would be an endorsement or selective benefit for the candidates who in this case seek relief. All that is required by Army

Regulation No. 360-61, it would seem, is even-handed neutrality.

The district court would require much more than even-handed neutrality. Its opinion urges:

> "It is clear that the First Amendment rights of the plaintiffs must be carefully weighed against the interests of the military in prohibiting political activity in the confines of the base and other exercises inimical to the military mission at Fort Dix. The reasoning behind the Regulations [Fort Dix Nos. 210-26, 210-27] here involved is apparent. Aside from urging personnel to vote, clearly a healthy motive, the military must remain politically antisepetic."

With the voting age at eighteen years probably the vast majority of the 28,000 people living in Fort Dix are entitled to vote. If they are to exercise that franchise intelligently they should have as free access to campaign information, subject to the time strictures of their military occupations, as citizens generally. A policy of antisepsis such as the district court envisioned would not be neutral. It would consign military voters to the category of the uninformed. But in fact there is no such policy of antisepsis. The record discloses that the military permits the circulation and distribution in Fort Dix of a wide range of newspapers and magazines, and that radios and televisions are available during off-duty hours. Thus the persons living in Fort Dix are exposed to the political ideas of those candidates whose campaigns are prominent enough or well-financed enough

to attract widespread media coverage. In these circumstances the antisepsis of Fort Dix Regulations Nos. 210-26 and 210-27 is hardly a neutral antisepsis. What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough nor sufficiently well-financed to attract media coverage, and who must make do with the more old fashioned face-to-face style of campaigning. Such a feigned neutrality serves no discernable military purpose, and cannot outweigh the first amendment rights of the minor candidates.

PRELIMINARY RELIEF

The need for immediate equitable relief for the candidates is apparent. On October 6, 1972, the election was less than a month away. Today only thirteen days remain. The district court held that there was § 1331 jurisdiction. As to the candidates, the record establishes their status as such and there is an overwhelming likelihood that at final hearing their candidacy will be valued in excess of $10,000. They brought this action promptly after being excluded on September 23, 1972. Their cases present a strong likelihood of success at final hearing. A preliminary injunction should have been granted. The barred pamphleteers are in a somewhat different position. Their interests are neither so directly connected with the November 7, 1972 election, nor so promptly and diligently pursued in the courts, as are the interests of the candidates. They make a lesser showing of

immediate irreparable injury and possibly a lesser showing of likelihood of meeting the jurisdictional amount. In their case it was, we think, within the bounds of permissible discretion for the district court to withhold relief until final hearing.

Judge Rosen concurs in the result (1) because the district court judge has determined § 1331 jurisdiction and no objection was made to this conclusion by the appellee in the district court, and (2) because this case is squarely within the parameters of the Supreme Court holding in *Flower* v. *United States*, *supra*.

The order of the district court will be reversed and the case remanded for the entry of a preliminary injunction directing the defendants to cease from interfering with the political campaigning by the candidate plaintiffs Spock, Hobson, Jenness and Pulley or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation between the date hereof and November 7, 1972. The order may provide that the right of the candidates to campaign and the distribution of campaign literature shall be subject to such restrictions as to time, place and numbers of persons involved, as shall have been shown by the defendants to be necessary to prevent interference with the military functions of the base, and the flow of military and civilian traffic, but shall not provide for the prior approval of any authority of the contents of any communication.

The case should be set down for a final hearing promptly to dispose of the claims of the candidate plaintiffs for injunctive relief after November 7, 1972, and of the claims for injunctive relief of the barred pamphleteer plaintiffs. The mandate of this court will issue forthwith.

LAYTON, *Senior Judge.*

With deference, I must dissent for two reasons.

First, in my view, the orderly administration of justice demands that the question whether the required jurisdictional amount is here present should be remanded to the District Court which made no substantive determination of this issue for the reason that it was unchallenged by the government in the lower court, Wolff v. Selective Service Local Board No. 16, 372 F.2d 817 (2d Cir. 1967).* Once a finding is made, the substantive question can then be decided on further appeal.

But even should the District Court, based upon some such rationale as advanced by Judge Weinstein

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*** At P. 826: "Because Judge McLean was of the opinion that this suit was not presently justiciable, he had no occasion to determine whether or not appellants could demonstrate the presence of the requisite amount in controversy. It is an unfortunate gap in the statutory jurisdiction of the federal courts that our ability to hear a suit of this nature depends on whether appellants can satisfactorily show injury in the amount of $10,000 but the fact remains and *on remand the District Court must determine this question.*" (Emphasis added.)**

in Cortright v. Resor, 325 F.Supp. 797, 810 (E.D. N.Y. 1971),* conclude that the requisite jurisdictional amount were present, I would have grave difficulty in agreeing for the reason that such a result is not in reality a finding of fact ** but, rather, an expression of judicial philosophy having the effect of judicially legislating a plain gap in the statutory jurisdiction of the federal courts. See *Wolff* at p. 826. Thus viewed, the chance of success on final hearing would be remote rather than extremely likely.

Although one's personal belief may be that the right of free speech is inherently far more valuable than the question of jurisdictional amount, nevertheless, one cannot use that belief to expand the jurisdiction of the federal courts beyond that expressly authorized by Congress. Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972).

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* "Free speech is almost by definition worth more than $10,000.00."

** Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir. 1970).

APPENDIX C

UNITED STATES SUPREME COURT

Friday, November 3, 1972

No. A-467

MELVIN LAIRD, SECRETARY OF DEFENSE ET AL.

v.

BENJAMIN SPOCK ET AL.

ORDER IN PENDING CASE

The application for a stay of the judgment of the United States Court of Appeals for the Third Circuit (No. 72-1934) is denied. The Chief Justice, Mr. Justice White, Mr. Justice Blackmun and Mr. Justice Rehnquist would grant the stay.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed October 31, 1972)

BENJAMIN SPOCK, ET AL.

v.

BERT DAVID AND MELVIN LAIRD

ORDER

AND NOW, this 31st day of Oct., 1972, pursuant to the mandate of the United State Court of Appeals for the Third Circuit in the above matter, IT IS HEREBY ORDERED:

1. Defendants are directed to cease from interfering with the political campaigning by the candidate plaintiffs Spock, Hobson, Jenness and Pulley or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation between the date hereof and November 7, 1972.

2. The right of the candidates to campaign and the distribution of campaign literature shall be subject only to such restrictions as to time, place and numbers of persons involved as shall be shown by defendants to be necessary to prevent interference with the military functions of the base and the flow of military and civilian traffic.

3. Defendants shall make no requirement of prior approval of the contents of any communication.

/s/ Clarkson S. Fisher
Clarkson S. Fisher
U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action 1621-72

(Filed November 1, 1972)

BENJAMIN SPOCK, ET AL, PLAINTIFFS

v.

BERT A. DAVID, ETC., ET AL, DEFENDANTS

ORDER

AND NOW, this 1st day of November, 1972, in furtherance of the Court's general order of October 31, 1972,

IT IS HEREBY ORDERED that the parties will abide by the following minimal terms concerning a campaign address by the candidate plaintiffs at the Fort Dix military reservation:

1. Candidates Spock, Hobson, Jenness and Pulley, and their designated representatives (hereinafter referred to as leafleteers) shall be authorized to distribute campaign literature and information concerning the date, time and place of the campaign by the said Spock, Hobson, Jenness and Pulley, as hereafter indicated, at the following areas, and during the times indicated:

(a) From noon until closing at the main PX and from 4:00 PM until closing at all branch

PX's, except that at the branch PX's the leaflets may be distributed only within an area of 50 feet on the sidewalk immediately to the front of the main entrance to the said branch PX.

(b) In all family housing areas during the hours from 12 Noon to 8:00 PM;

(c) At the movie theatres from 6:30 PM until the start of the second performance, if any;

(d) At the main commissary from noon until closing;

(e) The leafleteers shall not distribute or attempt to distribute leaflets or campaign material to any soldiers while engaged in any training, or to soldiers in formation, nor shall they interfere with any traffic or other activities of any personnel; nor will they enter any buildings or place leaflets or campaign material on cars or in any building;

(f) There will be no more than 25 leafleteers on Fort Dix at any one time.

2. Fort Dix will make available to the said Spock, Hobson, Jenness and Pulley the parking lot adjacent to Theatre #5 (Building 5164) for them to campaign on Saturday, November 4, 1972 from 1:30 PM to 4:00 PM; said campaign will be conducted within this area without interference with the plaintiffs or soldiers who may desire to attend this rally. Military police, however, may perform normal traffic control functions and take necessary security measures.

3. The plaintiffs and their aides for the campaign on Saturday, November 4, 1972 will not exceed 25.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1621-72

(Filed June 13, 1973)

BENJAMIN SPOCK, JULIUS HOBSON, LINDA JENNESS, ANDREW PULLEY, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY, ROBERT STANTON, PLAINTIFFS

vs

BERT DAVID, Commander, Fort Dix Military Reservation, MELVIN LAIRD, Secretary of Defense, DEFENDANTS

MEMORANDUM

Plaintiffs applied for a permanent injunction prohibiting the defendants from interfering with their attempts to make political speeches and to distribute anti-war leaflets on the military reservation at Fort Dix, N.J. They seek to establish jurisdiction in this Court by virtue of 28 U.S.C. Section 1331.

Initially, plaintiffs sought a preliminary injunction in this Court and after a hearing the application was denied. *Spock* v. *David*, 349 F. Supp. 179 (D.N.J. 1972). Plaintiffs promptly appealed to the Third Circuit Court of Appeals which reversed and remanded. *Spock* v. *David*, 469 F2d 1047 (3d Cir. 1972).

At the hearing before this Court on the preliminary

injunction I assumed jurisdiction and the lack of it was not urged here by the government. It was, however, raised on appeal and the Circuit Court held that the office-seekers should have prevailed and the defendants enjoined preliminary. The pamphleteers were refused the same relief as their claims were not connected with the election.

Having disposed of the claim of violations of plaintiffs' First Amendment rights in the factual setting here contrary to that of this Court, the Court of Appeals remanded this matter for final hearing on the application for a permanent injunction.

At the outset of the hearing on the remand to this Court, the parties stipulated that the proofs taken at the hea ing for preliminary injunction be incorporated as part of this record. The facts found by me in *Spock* v. *David*, 349 F. Supp. 179 at 180-181 are part of my findings herein.

The proposed activities of the plaintiffs are somewhat different. At the time of the preliminary application, plaintiffs Spock and Hobson were Presidential and Vice-Presidential candidates of the Peoples Party, and Linda Jenness and Andrew Pulley were seeking the same offices under the auspices of the Socialist Workers Party. Plaintiffs Ginaven, Misch, Hardy and Stanton are people interested in handing out anti-war literature and conscientious objector information to members of the armed forces based at Fort Dix. Plaintiffs' answers to defendants' interrogatories disclosed that plaintiffs Jenness and Pulley were below the constitutional age limit for the

office they were seeking. Therefore, as to them, the complaint is dismissed.

Plaintiffs Spock and Hobson were hardly a factor in the Presidential race of 1972 and were defeated. They, however, desire to continue political activity on the military reservation and the leafleteers still wish to distribute their literature at the same place. In view of the clear direction of the Third Circuit Court of Appeals in this matter, the issue is whether or not this Court has jurisdiction to grant the relief sought under 28 U.S.C. Section 1331.

Like the Third Circuit Court of Appeals, I cannot say that the views expressed by Judge Weinstein in *Cortright* v. *Resor*, 325 F. Supp. 797, 808-811 (E.D. N.Y. 1971), *rev'd on other grounds*, 447 F.2d 245, 250-251, (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972), that almost by definition free speech is worth more than $10,000, are unreasonable. However, at the final hearing plaintiffs introduced testimony which clearly indicates that the amount in controversy exceeds the $10,000 jurisdictional requirement of 28 U.S.C. 1331. In order to get their message to the soldiers at Fort Dix by means other than those which they attempted the cost would be prohibitive to the plaintiffs. A full page of Time Magazine would have cost $12,125.00 in black and white and $18,790 in color. Local radio advertising which could be received at Fort Dix would cost in excess of $1100 per week. Direct mailing of literature to members of the military at Fort Dix would cost between $3500 and $4000 per 1000 soldiers and it has been

established that army personnel on the base is in the neighborhood of 10,000. In addition to trainees and cadre there are over 6000 people living on the base in family units in addition to 2600 civilians employed there. Jurisdiction then is clearly established.

Therefore, under the mandate of the Third Circuit Court of Appeals, defendants should be and are permanently enjoined from interfering with the political campaigning of plaintiffs Spock and Hobson and the distribution of campaign literature on their behalf within the unrestricted areas of the military reservation at Fort Dix and from interfering with the distribution of literature by plaintiffs Ginaven, Misch, Hardy and Stanton within areas where the public has open access to Fort Dix. This injunction shall not apply, however, to the areas designated as restricted by the military command at Fort Dix and subject to the restrictions by the same command as to time, place and numbers of persons involved, as shall be shown by the defendants to be necessary to prevent interference with the military mission of the base and the flow of military and civilian traffic.

Defendants are further restrained from making any requirement of prior submission for approval of the contents of any communication and are further enjoined from the enforcement of Fort Dix Regulation 210-27 which requires prior submission and approval of materials distributed on the base and Fort Dix Regulation 210-26 which prohibits political speeches on the base.

Defendants are further enjoined from issuing bar

notices based on the protected activity described in this opinion or evicting plaintiffs for this activity. The order of this Court shall not be construed to prevent defendants from issuing bar notices and evicting persons from Fort Dix for other unlawful activities.

The complaint of plaintiffs Jenness and Pulley is dismissed. There will be no costs assessed. Submit an Order in conformity with this opinion and the opinion of Judge Gibbons in *Spock* v. *David*, 469 F. 2d 1047 (3d Cir. 1972).

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action 1621-72

(Filed June 22, 1973)

BENJAMIN SPOCK, ET AL., PLAINTIFFS

v.

BERT DAVID, ETC., ET AL., DEFENDANTS

FINAL ORDER

AND NOW, this 22nd day of June, 1973, pursuant to the mandate of the United States Court of Appeals for the Third Circuit, and after final hearing, the Court hereby makes the following Order:

1. This Court has valid federal question jurisdiction of this case pursuant to 28 USC 1331 based on the following findings: * * * (2) the rights asserted here have a value in excess of $10,000; (3) plaintiffs have offered concrete evidence showing that the rights asserted here have a value in excess of $10,000.

2. Defendants are permanently directed to cease and are permanently enjoined from: (1) interfering with political campaigning by the plaintiffs Spock, Hobson, and Socialist Workers Party, or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation; and (2) interfering with dis-

tribution of literature by the plaintiffs, Ginaven, Misch, Hardy and Stanton, within the unrestricted areas of the Fort Dix Military Reservation. This injunction shall not apply, however, to the areas designated as restricted by the military command at Fort Dix.

3. The right of the candidate plaintiffs to campaign and the right of the candidate and pamphleteer plaintiffs to distribute literature shall be subject to such restrictions as to time, place and numbers of persons involved as shall be shown by defendants to be necessary to prevent interference with the military mission of the Base and the flow of military and civilian traffic.

4. Defendants shall make no requirement of prior submission or approval of the contents of any communication distributed by plaintiffs.

5. Defendants are further enjoined from enforcing Fort Dix Regulation 210-27 insofar as it requires prior submission and approval of materials to be distributed on the Base. In addition, defendants are enjoined from enforcing Fort Dix Regulation 210-26 insofar as it prohibits political speeches on Fort Dix by the prevailing plaintiffs.

6. Defendants are enjoined from issuing bar notices and letters to plaintiffs based on the constitutionally protected activity described in this order. The order of this Court shall not be construed to prevent defendants from issuing bar notices and evicting persons from Fort Dix for other unlawful activity.

7. The complaint of plaintiffs Jenness and Pulley is dismissed.

No costs.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1995

BENJAMIN SPOCK, JULIUS HOBSON, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY and ROBERT STANTON, APPELLEES

v.

BERT A. DAVID, Commander, Fort Dix Military Reservation, JAMES R. SCHLESINGER, Secretary of Defense, APPELLANTS

(D.C. Civil Action No. 1621-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued June 14, 1974
Before STALEY, GIBBONS and WEIS, *Circuit Judges*

OPINION OF THE COURT

(Filed August 14, 1974, as amended
September 23, 1974)

GIBBONS, *Circuit Judge*

This case is before us on an appeal from a final order of the district court which granted injunctive relief protecting plaintiffs' first amendment rights from interference by the military authorities at the Fort Dix Military Reservation. The case was before us in October, 1972 on an appeal from the denial of a preliminary injunction, which we reversed. *Spock* v. *David*, 469 F.2d 1047 (3d Cir. 1972). At that time two categories of plaintiffs were before us. Spock and Hobson were candidates of the Peoples Party for President and Vice President of the United States in the election to be held on November 7, 1972. Jenness and Pulley were candidates for the same offices of the Socialist Workers Party. They had been denied permission to conduct a political meeting or to distribute political literature on the Reservation. We referred to those plaintiffs and the Socialist Workers Party as the candidates. Ginaven, Misch, Hardy and Stanton were individual political activists who in the past had distributed leaflets within the Fort Dix Military Reservation, and who had, as a result of that activity, received from the commanding officer of that base letters ejecting them from Fort Dix and barring their reentry. We referred to Ginaven, Misch, Hardy and Stanton collectively as the barred pamphleteers. In reversing the

district court we remanded for the entry of a preliminary injunction directing the defendants to cease from interfering with the political campaigning by the candidate-plaintiffs between the date of our opinion and November 7, 1972. We directed that the case be set down for a final hearing promptly to dispose of the candidate-plaintiffs' claim for injunctive relief after November 7, 1972, and of the claims for injunctive relief of the barred pamphleteer-plaintiffs.

On remand the district court proceeded in compliance with our mandate. It granted the candidate-plaintiffs preliminary injunctive relief pending the November, 1972 election, and set the matter down for final hearing. On December 4, 1972 the defendants filed an answer which affirmatively pleaded that the district court lacks subject matter jurisdiction. At the outset of the final hearing the parties stipulated that the proofs taken in connection with the hearing on the preliminary injunction would be incorporated as a part of the record at final hearing. It appeared that candidate-plaintiffs, Jenness and Pulley, were not of age to be eligible under the Constitution to serve as President and Vice President and their complaint was dismissed. They do not appeal.[1] The only additional testimony offered and received at the final hearing dealt with the jurisdictional amount requirement. 28 U.S.C. § 1331.

The district court, with the identical factual record before it on the merits of the first amendment

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[1] The Socialist Workers Party remains a plaintiff.

claim as was before us in *Spock* v. *David*, *supra*, properly treated that decision as law of the case on the first amendment issue. The defendants on this appeal are in the apparent dilemma of seeking to have us overrule *Spock* v. *David* on the merits while at the same time pressing the contention that there is no federal jurisdiction. This panel is also bound by the law of the case on essentially the same record. This being so we will not repeat the discussion of the merits of the claim. *See Spock* v. *David*, 469 F.2d at 1053-56.

At the time of final hearing the candidate-plaintiffs, Spock and Hobson, though defeated in the presidential race of 1972, desired to continue political activity on the Fort Dix Military Reservation, and the barred pamphleteers desired to distribute their literature on that base. Thus the dispute over jurisdictional amount was not moot. When the case was before us on the appeal from the denial of a preliminary injunction we indicated that the only basis for federal jurisdiction was 28 U.S.C. § 1331, and that the jurisdictional amount requirement of that section must be met. We pointed out:

> "Section 1331 refers both to sum and to value. In cases in which there is an adequate remedy at law, the recovery of damages, the jurisdictional amount must be determined by reference to the sum of those damages. In cases where there is no adequate remedy at law, the measure of jurisdiction is the value of the right sought to be protected by injunctive relief." 469 F.2d at 1052.

We did not find it necessary, in passing upon the claim for preliminary injunctive relief, to detail the methods by which the right to convey a political message might be valued for purposes of § 1331. Jurisdictional amount had not then been traversed by an affidavit or answer in the district court, and we could not say as a legal certainty that the plaintiffs would never be able to establish their jurisdictional claim. Looking at the value of the right to campaign for the offices of President and Vice President, we concluded that it was more likely than not that the district court would hold that this right had a value in excess of $10,000, and we ordered a preliminary injunction. We were less certain about the ability of the pamphleteer-plaintiffs to succeed at final hearing, and declined to order a preliminary injunction.

At final hearing the plaintiffs, while continuing to urge, as they had before this court, that free speech is by definition worth more than $10,000 and that such an allegation ought not be subject to denial,[2] and while continuing to rely on 28 U.S.C. § 1361, introduced testimony which the district court found "clearly indicates that the amount in controversy exceeds the $10,000 jurisdictional requirement of 28 U.S.C. 1331." Appendix at 288a (Memorandum of District Court).

That testimony established the cost of getting the plaintiffs' political message to the 28,000 people liv-

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[2] *See Cortright* v. *Resor*, 325 F. Supp. 797, 810 (E.D. N.Y.), *rev'd on other grounds*, 447 F.2d 245, 250-51 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

ing in Fort Dix by those alternative means which would remain available to them were the challenged bar orders to remain in effect. The testimony was that the alternative means comprised paid advertisements on television and radio stations which broadcast to that viewing area, paid advertisements in print media which the military authorities permitted to circulate on the reservation and direct mail. A full page advertisement in an edition of *Time* magazine which accepted regional advertising for New Jersey would have cost $12,125.00 in black and white and $18,790.00 in color. Local radio advertising which could be received at Fort Dix would cost $1,116.00 a week. A direct mailing would cost between $3,-500.00 and $4,000.00 per 1000 soldiers. The testimony suggested that none of the alternatives would be likely to be as effective as the rallies and the pamphlets prohibited by the military defendants.

The defendants do not challenge the testimony that the cost of alternative means of communication of the political messages sought to be transmitted would far exceed $10,000. They contend that all this undisputed evidence, on which the district court relied in finding the requisite jurisdictional amount, is irrelevant. Their attack is frontal and total. They urge that first amendment rights are incapable of valuation, and that absent a new congressional enactment, there is no federal forum whatsoever for the protection of those rights against deprivations by federal officials. In a footnote they suggest citing Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 Yale L.J. 1385 (1964), that state courts

similarly lack power to enjoin federal officers. Their position, in short, is that no court may entertain a civil suit against a federal officer to enjoin his interference with the exercise of rights protected by the first amendment. If the defendants' frontal and total attack were to succeed they would, of course, have no interest in anything we might have said in *Spock* v. *David*, *supra*, on the merits of the first amendment claim, since they would be free to do as they pleased regardless. But we are past that point. In *Spock* v. *David*, 469 F.2d at 1051, we expressly declined to follow *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir.), *cert. denied*, 400 U.S. 960 (1970). The rights here in issue are intangible, but they are no more incapable of valuation in money than is pain and suffering, or reputation, or the intangible value of a proper selective service classification, or the intangible value of the right to be tried by a civilian rather than a military tribunal. *See Sedivy* v. *Richardson*, 485 F.2d 1115 (3d Cir. 1973). We have approved valuation of the good will of a trademark, for jurisdictional amount purposes, by looking at the amount spent in advertising the mark. *Schering Corporation* v. *Sun Ray Drug Co.*, 320 F.2d 72, 76 (3d Cir. 1963). The testimony that means of communication alternative to those of which the plaintiffs would be deprived by the continuance of the challenged bar orders would cost in excess of $10,000 was sufficient, for purposes of § 1331, to quantify the value of the rights here sought to be protected. The finding of the district court that such alternative means would cost in excess of $10,000 is amply supported by the record.

The defendants urge that the plaintiffs did not offer proof of the cost of relatively inexpensive alternative techniques of communication such as opening a storefront in Wrightstown, New Jersey, adjacent to one of the entrances to the reservation, and that the district court did not discuss such alternatives. But the defendants offered no evidence as to the availability or cost of the suggested alternatives, or as to their communicative effectiveness compared to the barred activities. They cannot on appeal suggest that the district court's finding, based on the evidence which was presented, was clearly erroneous. There is federal question jurisdiction under § 1331.

Since on the record made in the district court jurisdictional amount was the only matter not governed by the law of the case announced in *Spock* v. *David*, *supra*, we affirm. While we have not repeated in this opinion the discussion of the merits of the first amendment claim set forth in our earlier opinion, we deem it appropriate to note that nothing said there and nothing set forth in the district court's injunction [3] should be construed as limiting the au-

[3] The injunction provides:

"2. Defendants are permanently directed to cease and are permanently enjoined from: (1) interfering with political campaigning by the plaintiffs Spock, Hobson, and Socialist Workers Party, or with the distribution of campaign literature on their behalf within the unrestricted areas of the Fort Dix Military Reservation; and (2) interfering with distribution of literature by the plaintiffs, Ginaven, Misch, Hardy and Stanton, within the unrestricted areas of the Fort Dix Military Reservation. This injunction shall not apply, however, to the areas designated as restricted by the military command at Fort Dix.

3. The right of the candidate plaintiffs to campaign and the right of the candidate and pamphleteer plaintiffs to distribute literature shall be subject to such restrictions as to time, place and numbers of persons involved as shall be shown by defendants to be necessary to prevent interference with the military mission of the Base and the flow of military and civilian traffic.

4. Defendants shall make no requirement of prior submission or approval of the contents of any communication distributed by plaintiffs.

5. Defendants are further enjoined from enforcing Fort Dix Regulation 210-27 insofar as it requires prior submission and approval of materials to be distributed on the Base. In addition, defendants are enjoined from enforcing Fort Dix Regulation 210-26 insofar as it prohibits political speeches on Fort Dix by the prevailing plaintiffs.

6. Defendants are enjoined from issuing bar notices and letters to plaintiffs based on the constitutionally protected activity described in this order. The order of this Court shall not be construed to prevent defendants from issuing bar notices and evicting persons from Fort Dix for other unlawful activity."

Appendix at 291a-92a (Final Order of the District Court).

thority of the military officials at Fort Dix to restrict access by non-military personnel generally to any part of the reservation, or to issue bar notices to and evict persons from even the open areas of the reservations for unlawful activities.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
For the Third Circuit.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1995

BENJAMIN SPOCK; JULIUS HOBSON; SOCIALIST WORKERS PARTY; JOHN GINAVEN; DONALD MISCH; ALAN HARDY; ROBERT STANTON

vs.

BERT A. DAVID, Commander, Fort Dix Military Reservation, JAMES R. SCHLESINGER, Secretary of Defense, APPELLANTS

(D.C. Civil Action No. 1621-72)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: STALEY, GIBBONS and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 22, 1973, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

August 14, 1974

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